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Supreme Court, U.S.
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No. 00-730

IN THE

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

NORMAN MINETA, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,

Respondents.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF AMICUS CURIAE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

A. Overview of the Racial Presumptions, Statutes, and Regulation 2

B. Overview of Respondents' Purported "Evidence" 12

SUMMARY OF ARGUMENT 15

ARGUMENT 16

I. The Court Should Not Permit Respondents to Rely On Evidence That Was Merely "Available to Congress" When Defending Naked Racial Classifications 17

II. The Court Should Not Permit Respondents to Rely Upon Vague, Conclusory and Ill-Defined Allegations of "Passive Participation" 22

CONCLUSION 30

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 8, 12, 14, 17

Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) ..... passim.

Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996) 23

City of Richmond v. J.A. Croson, 488 U.S. 469 (1989) ..... passim.

DynaLantic Corp. v. Department of Defense, Civil Action No. 95-2301 (D.D.C.) (EGS) ..... passim.

O'Donnell Construction Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992) 20, 22

Plyler v. Doe, 457 U.S. 202 (1981) 17

Reno v. Bossier Parrish, 528 U.S. 320 (2000) 1

Shaw v. Hunt, 517 U.S. 899 (1996) 18, 21, 22

Watson v. Ft. Worth Bank & Trust, 487 U.S. 977 (1988) 20

Constitutional Provisions, Statutes and Regulations:

15 U.S.C. § 631(f)(2) 4, 19

15 U.S.C. § 637(a) ..... passim.

15 U.S.C. § 637(d)(3)(C)(ii) 3

15 U.S.C. § 637(d) ..... passim.

Pub. L. No. 105-178, 112 Stat. 107 2

Pub. L. No. 106-451, 114 Stat. 1 5

13 C.F.R. § 124.1002(b)(2) (2000) 10

13 C.F.R. § 124.1002(c) (2000) 7

13 C.F.R. § 124.1008 (2000) 9

13 C.F.R. § 124.1008(g) (2000) 9

13 C.F.R. § 124.101 (2000) 5

13 C.F.R. § 124.103(a) (2000) 6

13 C.F.R. § 124.103(b)(1) (2000) 4

13 C.F.R. § 124.103(c) (2000) 10, 11

13 C.F.R. § 124.103(c)(1) (2000) 6

13 C.F.R. § 124.104 (2000) 6

13 C.F.R. § 124.104(a) (2000) 6

13 C.F.R. § 124.104(c)(2) (2000) 7

13 C.F.R. § 124.105 (2000) 10

13 C.F.R. § 124.2 (2000) 10

48 C.F.R. part 19 (2000) 3

49 C.F.R. part 26, App. E (2000) 6

49 C.F.R. § 26.5 (2000) 5

49 C.F.R. § 26.67(a)(2)(iii) (2000) 7

49 C.F.R. § 26.67(c) (2000) 9

49 C.F.R. § 26.67(d) (2000) 6

49 C.F.R. § 26.69 (2000) 10

49 C.F.R. part 26 3

Federal Register:

8(a) Business Development/Small Disadvantaged Business Status Determination, 63 Fed. Reg. 35767 (June 30, 1998) 3

Public Notice Regarding Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26041 (May 23, 1996) 12, 26-29

Small Disadvantaged Business Procurement; Reform of Affirmative Action in Federal Procurement, 63 Fed. Reg. 35713 (June 30, 1998) 26-28

Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. 25648 (May 9, 1997)..... 27, 29

Small Disadvantaged Business Procurement; Reform of Affirmative Action in Federal Procurement, 63 Fed. Reg. 71724 (December 29, 1998) 27

Other Authorities:

U.S. Department of Transportation, *The New DoT DBE Rule Is Narrowly Tailored* 9-10

The Abuses in the SBA's 8(a) Procurement Program, Hearing Before the Committee on Small Business of the House of Representatives, 104th Cong., 1st Sess. 107 (1995).....6-8, 21

Davern, Michael E. and Patricia J. Fisher, *U.S. Census Bureau, Household Net Worth and Asset Ownership: 1995*.....7

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LaNoue, George R. and John C. Sullivan, *Gross Presumptions: Determining Group Eligibility for Federal Procurement Preferences*, 41 Santa Clara L. Rev. 103 (2000).....19

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H.R. Rep. No. 949, 95th Cong., 2d Sess. 11 (1978)..... 19

W. Dellinger, Assistant Attorney General, Office of Legal Counsel, Memorandum to General Counsels, re: *Adarand*, published in *Daily Labor Rep.* (BNA), No. 125, at E-1 (June 29, 1995) 21, 24, 25

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Executive Order No. 11246 (1965).....24

Enchautegui, María E., *et al.*, *Do Minority Owned Businesses Get A Fair Share of Government Contracts?* (1996 & 1997).....29

INTEREST OF AMICUS CURIAE

The Center for Individual Rights ("CIR") is a non-profit, public interest law firm. It has participated in the litigation of numerous cases concerning the use of race by government officials before this Court, including *Reno v. Bossier Parrish*, 528 U.S. 320 (2000). CIR also is counsel of record to DynaLantic Corp. in *DynaLantic Corp. v. Department of Defense, Small Business Administration, and the Department of the Navy*, Civil Action No. 95-2301 (D.D.C.) (EGS) (hereinafter, "*DynaLantic*"), which is pending in the United States District Court for the District of Columbia. That case involves a challenge to the federal government's use of race in procurement, and was cited by Petitioner and Respondents in their Petition for Writ of Certiorari and Opposition to that petition, respectively.[1]

CIR believes that it is in a unique position to assist the Court in its consideration of this case. In connection with the *DynaLantic* case, and as a public interest law firm, CIR has obtained and studied various government documents as well as other information concerning some of the statutes and race-conscious mechanisms at issue. Those documents include the government's "post-*Adarand*" review of some of the statutes cited by Petitioners and Respondents as well as deposition transcripts, discovery

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[1] Pursuant to Rule 37.2(a) of the Rules of this Court, all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, amicus curiae CIR affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

responses, and other material that go to the heart of the issues and the government's representations. Part of that review consisted of questions propounded by the U.S. Department of Justice ("DoJ") to agencies like the U.S. Small Business Administration ("SBA"). *See* Lodged Doc. 1, "U.S. Small Business Administration Management of the 8(a) Program: Narrow Tailoring" (hereinafter, "SBA 8(a) Document"). CIR believes that the Court should have the benefit of that information and, accordingly, has lodged some of that material with the Clerk's Office.

STATEMENT OF THE CASE

CIR adopts the statement of the case in the petition. We highlight some significant facts and errors by the appeals court.

A. Overview of the Racial Presumptions, Statutes, and Regulations

The Disadvantaged Business Enterprise ("DBE"), Program administered by the U.S. Department of Transportation ("DoT"), which Congress enacted most recently as the Transportation Equity Act for the 21st Century ("TEA-21"), Pub. L. No. 105-178, 112 Stat. 107, is part of a wide and far-ranging scheme of race-conscious statutes and regulations that share a common framework and intersecting definitions and applications. Section 1101(b)(2)(B) of TEA-21 provides that "[t]he term 'socially and economically disadvantaged individuals' has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. § 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this

subsection."[2]

Accordingly, to analyze the DBE Program, it also is necessary to have an understanding of Section 8(d) of the Small Business Act. Pursuant to Section 8(d), any person who holds herself or himself out and identifies himself or herself as a member of the following racial or ethnic *groups* shall be presumed to be socially *and* economically disadvantaged: Black Americans, Hispanic-Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the SBA pursuant to the Section 8(a) of the Small Business Act (15 U.S.C. § 637(a)) and its implementing regulations (the "Section 8(a) Program"). According to Section 8(d), the presumption is mandatory.[3] Moreover, any group presumed to be socially disadvantaged under the Section 8(a) Program is also be presumed to be disadvantaged for purposes of Section 8(d) and the DBE Program. *See* 15 U.S.C. § 637(d)(3)(C)(ii). Consequently, to analyze the DBE Program, it also is necessary to understand the Section 8(a) Program.

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[2] TEA-21, through its implementing regulations, provides mechanisms for both direct federal procurement and federal financial assistance to states and localities. *See* 49 C.F.R. part 26; 48 C.F.R. part 19. The procurement that initiated this action was let directly by the federal government and contained a clause that prevented Adarand from bidding on the subcontract at issue on an equal basis with other firms. *See Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1156 (10th Cir. 2000).

[3] *See* 8(a) Business Development/Small Disadvantaged Business Status Determination, 63 Fed. Reg. 35767, 35770 (June 30, 1998) ("Section 8(d)(3)(C)(ii) clearly authorizes a presumption of both social and economic disadvantaged [sic] for members of certain designated groups."). In response to a federal agency commentator, the SBA "believe[d] that eliminating the presumption for economic disadvantage would be contrary to the underlying statutory authority." *Id.*

Under the SBA Program, the groups listed in the last paragraph receive a presumption of social disadvantage. The identity of the groups is not set forth on the face of Section 8(a); instead, the identity of the major groups is set forth in 15 U.S.C. § 631(f)(2), which contain the Congressional findings, and which the SBA relied upon to promulgate a regulation listing these groups (and their alleged "subgroups") as entitled to a presumption of social disadvantage. Other minority groups subsequently were added by legislation or through SBA regulation so that under the Section 8(a) Program (and for Section 8(d) and the DBE Program), any person who holds herself or himself out and identifies himself or herself as a member of the following racial or ethnic groups is presumed to be "socially disadvantaged": Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau) , Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal) and members of other groups that the SBA designates from time to time. 13 C.F.R. § 124.103(b)(1) (2000).[4]

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[4] The SBA does not have a procedure whereby it reviews the groups after they receive a presumption of being disadvantaged. *See* Lodged Doc. 2, p. 21, line 12 to p. 22, line 22 (deposition excerpts of SBA's representative in *Rothe Development Corp. v. Department of Defense, et al.*, Civil Action No. SA98CA1011EP (W.D. Tex.) (*"Rothe"*). Accordingly, no race or ethnicity has ever been removed from the list of presumed groups. Lodged Doc. 2, p. 23, lines 1-2.

The SBA considers American citizens from Portugal, among others, to be of Hispanic descent and entitled to a presumption of social disadvantage. *See* Lodged Doc. 2, p. 51, lines 2-5.

Only U.S. citizens are eligible to participate in the Section 8(a) Program. 13 C.F.R. § 124.101 (2000). Both U.S. citizens and lawful permanent resident aliens are eligible to participate in the DBE Program. *See* 49 C.F.R. § 26.5 (2000). In both programs, however, there is no *per se* length of a time an individual must identify himself or herself with one of the identified groups or be a member of American society to receive the presumption of social disadvantage.

Women are not presumed to be socially or economically disadvantaged under Sections 8(a) or 8(d) of the SBA Act. There is no explanation given as to why women are included in one statutory scheme (for DoT) and excluded in another statutory scheme (for the SBA). In fact, in 1982, the SBA denied the petition filed on behalf of women for inclusion as a presumed socially disadvantaged group. *See* SBA 8(a) Document at 15.

The government claims that other groups, such as Italian-Americans, were victims of discrimination. *See* Wartime Violation of Italian American Civil Liberties Act, Pub. L. No. 106-451, 114 Stat. 1. Yet, they are not included in the list of presumed groups.

Under the DBE and Section 8(a) Programs, and Section 8(d), persons who are not members of the presumed groups must establish by a preponderance of the evidence that they are "socially and economically disadvantaged." 49 C.F.R. § 26.67(d) (2000); 13 C.F.R. § 124.103(c)(1) (2000); 13 C.F.R. § 124.104 (2000).

"Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within *American society* because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control." 13 C.F.R. § 124.103(a) (2000) (emphasis added); 49 C.F.R. part 26, App. E (2000). Thus, proof of societal discrimination (including for those *groups* who petitioned for presumed disadvantaged status) suffices to establish social disadvantage.

"Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged." 13 C.F.R. § 124.104(a) (2000); 49 C.F.R. part 26, App. E (2000). However, the SBA does not make that comparison between socially disadvantaged individuals and non-socially disadvantaged individuals. *See The Abuses in the SBA's 8(a) Procurement Program, Hearing Before the Committee on Small Business of the House of Representatives*, 104th Cong., 1st Sess. 107 (1995) (testimony of Karen S. Lee, Deputy Inspector General of the SBA; hereinafter "*Lee Testimony*") ("This failure allowed participants to continue in the 8(a) program although the strong financial condition of their companies

should no longer have qualified them as economically disadvantaged.").

Persons are not "economically disadvantaged" and are ineligible for the Section 8(a) Program if their net worth is $250,000 or more, *excluding* the equity in their principal residence and value of their business (*i.e.*, in reality an "adjusted net worth"). *See* 13 C.F.R. § 124.104(c)(2) (2000). *See also* 13 C.F.R. § 124.1002(c) (2000). "For continued ...eligibility after admission to the program, net worth must be less than $750,000." *Id.* For the DBE Program, only persons with a net worth of $750,000 or more, *excluding* the equity in their primary residence and equity in their business, are ineligible. 49 C.F.R. § 26.67(a)(2)(iii) (2000).

As revealed by a U.S. Department of Commerce study, the vast majority of Americans would qualify as "economically disadvantaged" under any of the definitions identified in the previous paragraph. *See* Davern, Michael E. and Patricia J. Fisher, *U.S. Census Bureau, Household Net Worth and Asset Ownership: 1995,* at xiv (table G); at 7 (table 4); at 8-9 (table 5) (1995). Thus, the economic prong of the disadvantage "test" does little to exclude individuals from participating in the DBE or similar programs. For all practical purposes, social disadvantage is the gateway into the program (thereby making the racial and ethnic presumptions far more important than the government wishes to admit).

There are wealthy individuals eligible for preferences in the Section 8(a) Program (which has a lower economic test than the DBE Program) when their "total net worth" is considered. *See Lee Testimony* at 107 ("Wealthy individuals continued to be eligible for the 8(a) program

because the equity in their companies and primary residences and the net worth of their spouses were not considered in determining whether they remained economically disadvantaged due to statutory exclusions.").

At least with respect to the Section 8(a) Program, the presumption of social disadvantage is conclusive, not rebuttable. After this Court's decision in *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995), the federal government undertook a government-wide review of its race-conscious affirmative action programs. The SBA 8(a) Document is one product of that review. The SBA admits that its contents are true and correct. *See* Lodged Doc. 3, interrogatory response No. 2, at 2, in *DynaLantic* (Exhibit B referenced therein was the SBA 8(a) Document); *see also* Lodged Document 4, interrogatory response No. 18, at 13, in *DynaLantic,* explaining creation of the SBA (Exhibit B referenced therein was the SBA 8(a) Document).

According to the SBA 8(a) Document, "membership in certain designated minority/racial groups is conclusive as to social disadvantage in the Section 8(a) Program." *See* SBA 8(a) Document, at 3, No. 8. The "presumption is rebutted *only* when there is a question of whether or not an applicant is in fact a member of one of the designated groups." *See also id.* at 8, No. 3; at 9, No. 8 (emphasis added). The SBA determined that *Congress intended* to confer a conclusive presumption of social disadvantage on these groups. *See* SBA 8(a) Document, at 2, No.6; *see also id.* at 3, No. 8.

Again, TEA-21 incorporates the racial and ethnic presumptions in Section 8(d) which, in turn, incorporates those and any group designated as disadvantaged under Section 8(a). Thus, by virtue of the Section 8(a) conclusive

presumption, any group or individual so designated is entitled to a presumption of disadvantaged status under the DBE and similar programs. And any member of that racial group for Section 8(a) purposes is conclusively (not rebuttably) presumed to be socially disadvantaged.

These consequences are reinforced by the fact that DoT and SBA have entered into a Memorandum of Understanding (available at http://osdbuweb.dot.gov/business/legislation/memofunder.html) providing for reciprocal certifications so that DBEs and small disadvantaged businesses ("SDBs")[5] can obtain, with minimal additional showings, entrance into the programs administered by DoT and SBA. Thus, aside from entrance through the statutory scheme, firms could seek to obtain DBE certification through the conclusive social presumption in the Section 8(a) Program.[6]

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[5] SDBs are firms that are considered to be socially and economically disadvantaged within the definition of 15 U.S.C. § 637(d) and its implementing regulations. All Section 8(a) firms automatically qualify as SDBs. 49 C.F.R. § 26.67(c) (2000); 13 C.F.R. § 124.1008 (2000); 13 C.F.R. § 124.1008(g) (2000). The SBA now certifies firms as SDBs. The government removed the ability of SDBs to "self-certify" their status as "disadvantaged" to reduce costs, prevent fraud and abuse and allegedly ensure that the program is administered fairly. *See* SBA News Release, No. 98-78 at 1 (SBA Press Office, September 21, 1998). *See generally* GAO, *Small Business: Status of Small Disadvantaged Business Certifications* (2001).

[6] DoT also apparently participates in the Section 8(a) Program pursuant to which contracts are set-aside, for which firms like Adarand cannot bid on. The various race-based affirmative action programs are duplicative, in whole or in part, insofar as they give preferential treatment to certain races. However, set-asides are a notable contrast to the provisions of TEA-21 dealing with federal financial assistance to states and local governments. *See The New DoT DBE Rule Is Narrowly Tailored* at 1 (Set-asides are limited to egregious cases of discrimination

Firms certified to participate in the DBE, Section 8(a), and SDB Programs must be owned and controlled at least 51% by individuals who are socially and economically disadvantaged, except for concerns owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations. 13 C.F.R. § 124.105 (2000); 13 C.F.R. § 1002(b)(2); (2000); 49 C.F.R. § 26.69 (2000). Thus, non-minority owners can reap the benefits of preferential treatment through a 49% ownership interest.

Firms are eligible to remain in the Section 8(a) Program for a maximum of nine years. 13 C.F.R. § 124.2 (2000). Very few firms have graduated from the Section 8(a) Program (*i.e.*, exited the program before nine years). There is no sunset provision for the Section 8(a) Program.

Given the racial and ethnic presumptions, it is not surprising that as of September 3, 1999, there were approximately 5,830 firms participating in the Section 8(a) Program of which approximately 105 (approximately 1.8%) were owned and controlled by individuals who established individual social disadvantage pursuant to 13 C.F.R. § 124.103(c) or its predecessor regulation. The other approximately 98.2% of the firms that were participating were owned and controlled by individuals who were presumed to be socially disadvantaged pursuant to a racial or ethnic presumption. *See* Lodged Doc. 4, interrogatory responses nos. 4 & 28, at 5, 18-19, in *DynaLantic*.

As of November 2, 1999, there were approximately 7,596 firms considered SDBs under Section 8(d), of which

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where other remedial mechanisms have not worked) (available at http://osdbuweb.dot.gov/business/dbe/NTcht.html?prettyprint=yes).

approximately 211 (approximately 2.7%) were owned and controlled by individuals who established individual social disadvantage pursuant to 13 C.F.R. § 124.103(c) or its predecessor regulation. The other approximately 97.3% of the firms that were participating were owned and controlled by individuals who were presumed to be socially disadvantaged pursuant to a racial or ethnic presumption. *See* Lodged Doc. 4, interrogatory responses nos. 5 & 28, at 5, 18-19, in *DynaLantic*.

The presence of so many firms that gained entrance through racial and ethnic presumptions is not surprising. Non-presumed members in the DBE and other program must individually establish social and economic disadvantage, criteria which – outside of the racial presumptions – are irredeemably vague. The General Services Administration told DoJ that with respect to the test for social and economic disadvantage:

> It appears from the proposed rule [proposing to change the standard for non-minorities from clear and convincing to preponderance of the evidence] that the SBA is expected to do something that it has not been able to do for the past 15 years.
>
> * * *
>
> We understand the conventional wisdom to be that the problems associated with non-minority eligibility (for instance, the small number of non-minorities admitted to the programs and the perceived difficulty of the standards) stem from the lack of specificity in the criteria and not the standard of proof.

See Lodged Doc. 5, at 4 (obtained through a Freedom of Information Act Request). Aside from that difference, the SBA also has published and disseminated material that highlights its efforts for the benefit of "minority" contractors and to increase the participation and certification of minority businesses in the Section 8(a) Program. *See* Lodged Doc. 6 (news releases and various memoranda of understanding with third parties; no longer available on the SBA's website).

B. Overview of Respondents' Purported "Evidence"

As with the statutory and regulatory scheme, the true state of Respondents' "evidence" purportedly supporting a "strong basis in evidence" for believing that these are continuing effects of past discrimination reveals a very different tale from those adopted by the Tenth Circuit.

In ruling against Adarand, the Tenth Circuit relied upon a list of manufactured "evidence" that the court believed Congress relied upon. *See Adarand*, 228 F.3d 1167 ("we turn to an examination of the evidentiary basis on which Congress relied to support its finding of discrimination. . . ."). First and foremost, the Tenth Circuit relied upon the so-called Appendix A[7] and the documents cited therein (such as the government-commissioned meta-study by the Urban Institute). However, Appendix A was "pretty much" the work of a then DoJ paralegal. DoJ took the draft report of Appendix A prepared by the paralegal, examined it for editorial mistakes and, subject to editorial changes, made it part of

[7] Public Notice Regarding Proposed Reforms to Affirmative Action in Federal Procurement (including the Appendix thereto entitled, "The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey"), 61 Fed. Reg. 26041 (May 23, 1996).

the Federal Register. Lodged Doc. 7, p. 25, lines 12-18; p. 31, lines 21-32; p. 53, line 1, 7-17; p. 128, line 13-18) (deposition excerpts of DoJ employee testifying on behalf of the United States in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, et al.*, Court File No. 00-CV-1026 JMR/RLE (D. Minn.) and *Gross Seed Company v. Nebraska Department of Roads, et al.*, Court File No. 4:00CV3073 (D. Neb.) (hereinafter "*Sherbrooke*")).

No one at DoJ knows whether and to what extent the paralegal reviewed the documents cited in Appendix A. Lodged Doc. 7, p. 35, line 15 to p. 36, line 14) (deposition excerpts in *Sherbrooke*). DoJ does not know if any of the alleged instances of discrimination or anecdotal reports in that document are true or if anyone read or even looked at any of the documents cited therein. Lodged Doc. 7, p. 37, lines 10-21 (deposition excerpts in *Sherbrooke*).

The federal government's post-*Adarand* review of affirmative action programs after 1995 was largely confined to the issue of narrow tailoring. If a racially-different treatment in a federal program was authorized by Congress, DoJ assumed that Congress had found a compelling interest and only reviewed the program for narrow tailoring. Lodged Doc. 7, p. 20, lines 13-17; p. 21, lines 6-8; p. 24, lines 14-21; p. 28, lines 15 to p. 29, line 2; p. 144, lines 1-4 (deposition excerpts in *Sherbrooke*).

Accordingly, it is not surprising that the SBA has not conducted any investigation or inquiry as to (1) the truthfulness, accuracy, or correctness of documents that it claims support the constitutionality of Section 8(a) and similar programs; or (2) the facts, grounds and documents that allegedly provide a strong basis in evidence to use those programs. Lodged Doc. 3, interrogatory response

No. 1, at 1, in *DynaLantic*. Respondents cannot say that Congress relied upon Appendix A or any document cited therein for enacting the DBE or Section 8(a) Programs or Section 8(d); respondents simply do not know and (with all due respect) neither did the Tenth Circuit.

Neither Congress nor the SBA considered the operation of non-race-conscious alternatives, such as anti-discrimination laws, before establishing the race-conscious requirements in the Section 8(a) Program. *See* SBA 8(a) Document, at 4, No. 1. Thus, the Tenth Circuit's attempt to distinguish *Croson* on that ground is just incorrect. *See Adarand, 228 F.3d at 1163.* The SBA also has not used other race neutral means that might also increase minority participation in contracting, such as the application of different standards regarding start-up costs, bonding costs, or other criteria for emerging businesses. *See* SBA 8(a) Document, at 6, No. 6.

Congressional hearings and reviews of the Section 8(a) Program also have not focused on the need for the racial preference. *See* SBA 8(a) Document, at 14, No. 5. In fact, Congress does not review the racial requirements in the Section 8(a) Program when new authorization is enacted. *See* SBA 8(a) Document, at 14, No. 4. The SBA also does not evaluate the need for the racial requirement. *See* SBA 8(a) Document, at 14, No. 6; at 1, No. 1.

SUMMARY OF ARGUMENT

The government defends its use of racial presumptions on two grounds. First, that they are rebuttable and, second, that the economic test excludes wealthy individuals from participating. Neither is true. The government's internal documents prove that the presumption of social disadvantage is conclusive for the Section 8(a) Program. Section 8(d) and, in turn, TEA-21 grant disadvantaged status to groups and individuals that the SBA designates as socially disadvantaged under Section 8(a). Other material shows that, by virtue of excluding a person's equity in a business and principal residence, wealthy people gain entrance to and remain eligible for preferential treatment. In any event, the high ceiling for net worth in the economic test excludes few people from participating.

The government's key evidence in this case, Appendix A, does not constitute a strong basis in evidence or a compelling interest. The federal government itself has not and is not discriminating against minority contractors in government procurement. The government does not know if anyone read any of the materials cited in Appendix A, and agencies that rely on it for race-conscious programs (like the SBA) never conducted any investigation into its alleged truth, accuracy, or completeness. Respondents must attempt to rely on that kind of "manufactured" evidence because it does not know what Congress actually relied upon to enact these kinds of race-based programs.

The federal government's statistical evidence is equally infirm. Adarand operates in the "construction subcontracting industry." According to the government's study, (1) construction and the construction subcontracting

operate regionally and (2) there is no disparity in the award of federal contracts or subcontracts to minorities in those construction and construction subcontracting in Adarand's region. (In fact, the government's study shows that minority contractors are "overutilized" therein.) Nor, according to a different government-commissioned report, is there a statistically significant disparity in the construction subcontracting industry regarding the award of state and local contracts. Moreover, that report did not conclude that any disparity cited therein was the result of discrimination; instead, it concluded that any number of factors could have caused the purported disparities in the examined areas.

Respondents cannot prove any intentional discrimination by the federal government, and rely only on ill-defined notions of "passive participation." Ultimately, respondents have only allegations of societal discrimination to defend their admitted use of race against Adarand.

ARGUMENT

The heart and soul of the DBE Program, and of the federal government's scheme that uses the twin pillars of Sections 8(a) and 8(d), are the racial and ethnic presumptions.[8]

Here, race is the key and critical component of the Programs.

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[8] No one, including the SBA, knows whether Congress would have enacted or re-enacted the Section 8(a) Program or Section 8(d) without race-conscious mechanisms or racial and ethnic presumptions. *See* Lodged Doc. 4, interrogatory response No. 25, at 16, in *DynaLantic*.

I. The Court Should Not Permit Respondents To Rely On Evidence That Was Merely "Available to Congress" When Defending Naked Racial Classifications

The use of race is an anathema to the concept of a free and democratic society. It is for that reason that government's use of racial classifications must be held to the highest scrutiny. Accordingly, the government has or should have the burden to prove that its racial classification passes strict scrutiny. *Adarand,* 515 U.S. at 224 ("any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."); *City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989). Accordingly, the government has the ultimate burden of proving that it has a compelling interest to use race and that the means chosen are narrowly tailored. "With respect to such classifications [that disadvantage a suspect class or impinge on the exercise of a 'fundamental right'], it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

Yet, here and with regard to the racial classifications in Sections 8(a) and 8(d), the government has turned a blind eye. Respondents do not know what Congress actually *relied upon*. The Tenth Circuit's citation of such alleged evidence, *Adarand*, 228 F.3d at 1167, shows that the appeals court profoundly misunderstood the nature of the government's purported "strong basis in evidence." Realizing that they cannot identify the contemporaneous evidence that Congress relied upon,

respondents have attempted to create a record of evidence that was "available" to Congress that *might* justify the Programs. By definition, the contents of the Library of Congress is "available" to Congress. If "availability" alone satisfied the test for strict scrutiny, the government should link to the library's card catalogue to bolster the purported evidence. Respondents' self-serving statements, and their manufactured evidence (like Appendix A), are entitled to no deference to a court applying strict scrutiny.[9]

The Tenth Circuit erred in this case by applying the term "strong basis in evidence" so as to gut the hearsay rule by considering material (*e.g.*, Appendix A) that did not constitute a strong basis in evidence and apparently admitting it for the truth of the matter asserted (including the contents of the purported disparity studies cited therein).

The presumptions of social disadvantage are conclusive at least with respect to the Section 8(a) Program and, because it incorporates Section 8(a) presumptions and results, in the DBE Program. Regardless if conclusive or truly rebuttable, however, the presumptions confer a vast benefit on a sizeable portion of the U.S. population in an increasingly diverse society. Yet, there are no statistics as to how many individuals within the preferred groups are, in fact, discriminated against (much less discriminated against by governmental units sufficient to justify an exception to

[9] Respondents cannot rely on post-enactment evidence (*i.e.*, material that postdates the passage of an act) to attempt to satisfy, post-hoc, strict scrutiny. This Court has held that a governmental actor which wishes to use racial classifications "must ensure that, *before* it embarks on an affirmative-action program, it has convincing evidence that remedial action is necessary." *Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (emphasis in original); *Croson*, 488 U.S. at 504.

the equal protection clause). Nor is there an explanation as to the precise reasons some of the groups have been included, and continue to be included, while others are excluded. The mere fact that the SBA has deemed them to be "subgroups" of the groups that Congress identified in 15 U.S.C. § 631(f) only begins the inquiry.[10] Without such statistics and detailed explanations (which the government cannot proffer), it is apparent that the preferred groups represent a random inclusion, designed and fostered in part for political purposes and bureaucratic convenience, not to remedy identified discrimination.[11]

The SBA sometimes even denied a petition filed on behalf of a group seeking a presumption of social disadvantage, only to grant that status subsequently. Such was the case with Tongans on whose behalf a petition was filed in 1986, which the SBA denied in 1987. *See* Lodged Doc. 8 (SBA-produced materials in *DynaLantic* concerning

[10] The presumption of social disadvantage inexplicably applies to some groups for which a history of discrimination is unlikely because they were barely present in the country until recently. *See* LaNoue, George R. and John C. Sullivan, *Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action*, 6 Journal of Policy History 439 (1994). *See generally* LaNoue, George R. and John C. Sullivan, *Gross Presumptions: Determining Group Eligibility for Federal Procurement Preferences*, 41 Santa Clara L. Rev. 103 (2000).

[11] Despite the presumptions in Section 8(d), the House of Representatives admitted that some members of the designated racial and ethnic groups identified therein may not be disadvantaged in the business world. H.R. Rep. No. 949, 95th Cong., 2d Sess. 11 (1978). Yet Congress required prime contractors to consider all members of the identified groups to be socially and economically disadvantaged to ensure nationwide uniformity in the program and convenience. *Id.* On its face, that fact renders the presumptions infirm and unconstitutional. *See Croson*, 488 U.S. at 508; *Adarand*, 228 F.3d at 1177.

the petition and its denial; also on file with the agency). The SBA subsequently included Tongans by regulation in 1989.

Proof of gross statistical discrepancies in the industry can give rise to an inference of intentional discrimination but cannot prove discrimination in and of itself. *See Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 992 (1988) ("[T]he inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance.").

Moreover, the fact that every minority group is treated as having been equally discriminated against (regardless of industry, geographic region, or other likely differentiating factors) show that no effort was made to tailor the remedy to provide relief for groups that allegedly have suffered identified discrimination in particular areas of American business. (That is, the programs treat African-Americans just like Asian Americans and just like Asian Indian Americans.) The end result is that the Programs do not, and cannot, apportion federal contract dollars only to those members of groups that have suffered discrimination in pertinent industries or to those industries where the requisite discrimination exists. *See O'Donnell Construction Co. v. District of Columbia,* 963 F.2d 420, 427 (D.C. Cir. 1992).[12] *See generally* SBA, Report to the U.S. Congress

[12] "[I]f the [minority] contractor is wealthy and has entered the mainstream of contractors in the community, a high bid [*i.e.*, losing bid] might not be traceable to the discrimination that a racial or ethnic classification is seeking to redress. Instead, such a bid might reflect an effort to exploit the classification." (footnote omitted). *See* W. Dellinger, Assistant Attorney General, Office of Legal Counsel, Memorandum to General Counsels, re: *Adarand*, published in *Daily Labor Rep.*, No. 125, at E-1, E-8 (June 29, 1995) (hereinafter, the "Dellinger Memo").

on Minority Small Business and Capital Ownership Development for Fiscal Year 1998 at 23 (showing widespread variation in contract actions and dollars by racial and ethnic groups). *See also Lee Testimony* at 109 ("I believe that SBA's inability (or unwillingness) to identify and graduate those 8(a) companies is a contributing factor to the concentration in the award of contracts."). The Tenth Circuit simply was incorrect in concluding that strict scrutiny does not require anecdotal and statistical evidence of discrimination for each racial and ethnic group receiving preferential treatment. *Adarand,* 228 F.3d at 1176, n.18. Far from "impart[ing] excess legitimacy to racial classifications," *see id.*, such a requirement is essential to curtailing the impermissible use of race.

It is axiomatic that before the government can use race, it must identify the discrimination with particularity. *Shaw,* 517 U.S. at 909; *Croson,* 488 U.S. at 504 (the government must identify the alleged discrimination, "public or private, with some specificity before they may use race-conscious relief."). There is no "compelling government interest" unless there is a "strong basis in evidence" of past discrimination in the relevant industry. *Croson,* 488 U.S. at 500. Contrary to the Tenth Circuit's decision (*see Adarand,* 228 F.3d at 1166-1167), there must be discrimination in the industry in question sufficient to justify race-conscious action (and not in procurement generally).

The government must make findings identifying specific discrimination by industry and region. *Croson,* 488 U.S. at 498 ("a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."); *Shaw,* 517 U.S. at 909 (specific discrimination "in a particular industry or region"); *O'Donnell Construction Co. v. District of Columbia,* 963 F.2d 420, 425 (D.C. Cir. 1992). In this case, that means the "construction subcontracting industry" in which Adarand operates. *See Adarand*, 228 F.3d at 1167-1168, 1173-1174. Findings that are not timely and not limited to the relevant industry category are of little value in demonstrating the existence of discrimination in that industry. *Croson*, 488 U.S. at 503. Thus, findings from twenty to thirty years ago are stale and offer no solace to Respondents. Indeed, if "amorphous" claims of past discrimination were sufficient, there would be no "logical stopping point to the use of racial preferences." *Croson,* 488 U.S. at 498-99, 505.

II. The Court Should Not Permit Respondents to Rely Upon Vague, Conclusory and Ill-Defined Allegations of "Passive Participation"

Respondents have not presented any evidence that the federal government has discriminated against minority contractors, in any industry. Indeed, the SBA has stated that it is unaware of any disparate treatment in connection with any federal procurement. *See* Lodged Doc. 9, interrogatory response, No. 8 at 55 (request 9) in *DynaLantic*. Nor is the SBA aware of any federal policy or practice that has or had a disparate impact on minorities' ability to compete for federal contracts and subcontracts

(even if such an impact somehow could establish discrimination or a strong basis in evidence). *See* Lodged Doc. 4, interrogatory No. 4, at 4-5, in *DynaLantic*.

Instead, the "evidence" proffered by the Respondents consists of the theory that the federal government is a "passive participant" in alleged discrimination in the construction industry – especially in the construction subcontracting industry in which Adarand operates. However, as with the term "strong basis in evidence," Respondents and the Tenth Circuit have misapplied the term "passive participation." In essence, without admitting as much, Respondents seek to define and use the term "passive participation" co-extensively with "societal discrimination" so that the exception swallows the rule and the use of race would be pervasive. The Court should not permit that sleight of hand.

An agency does not become a passive participant in private discrimination merely by awarding contracts to a market where a disparity between minority/non-minority contractors exists. *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia,* 91 F.3d 586, 602 (3d Cir. 1996) ("[N]othing in *Croson* suggests that awarding contracts pursuant to a competitive bidding scheme and without reference to association membership could alone constitute passive participation by the City in membership discrimination by contractor associations.") Instead, the agency must have affirmatively (if not intentionally) endorsed discrimination.

Under the justification that respondents and others proffer in support of race-based programs, there is an obvious and important difference between (1) seeking to prohibit and (if necessary) remedy specific practices of the

federal government where it unintentionally has provided financial assistance (directly or through states and localities) to prime contractors that engage in identified, intentional discrimination versus (2) seeking to remedy funding that has an alleged disparate impact because federal financial assistance is somehow "used" in an industry which purportedly exhibit the effects of discrimination. The DBE Program seeks to address that second situation and, thereby, attempts to remedy (if anything) societal discrimination. It is precisely for that reason that Appendix A lapses into a discussion of purported "evidence" of (a) barriers to minority contracting opportunities and the formation and development of minority businesses; and discrimination (b) by trade unions, employers, lenders, prime contractors and private sector customers, suppliers, business networks, and in access to contracting markets and bonding. The federal government, however, has strong and long-standing anti-discriminatory policies so that a federal contractor that might otherwise discriminate cannot do so. *See*, *e.g.*, Executive Order No. 11246 (1965).

Precisely *how* the federal government passively participates in private discrimination and the like, and the *effects* thereof, are noticeably absent from Appendix A. Moreover, DoJ acknowledges that *assuming these problems existed* it may not be sufficient to impose race-conscious programs outside of the industries that are allegedly discriminating (*e.g.*, in the credit industry).[13] Dellinger

[13] The Tenth Circuit relied heavily on such alleged financial discrimination and its alleged effect on minority businesses to conclude that Respondents could use race-based programs in the construction and construction subcontracting industries. *See Adarand*, 228 F.3d at 1169 ("The government evidence is particularly striking in the area of race-based denial of capital, without which the formation of minority subcontracting enterprises is stymied.").

Memo at E-33 ("[A] history of lending discrimination against minorities cannot serve as a catch-all justification for racial and ethnic classifications benefitting minority-owned firms through the entire economy; application of the narrow tailoring test would suggest that if lending discrimination is the problem being addressed, then the government should tackle it directly.")

The Tenth Circuit found, as the crux of passive participation and the government's strong basis in evidence, two types of discriminatory barriers:

> The first discriminatory barriers are due to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts.

Adarand, 228 F.3d at 1167-1168. There is no explanation of how the federal government "participated" (passively or otherwise) in this private discrimination.

The Tenth Circuit recognized that anecdotal evidence alone is insufficient to establish a compelling interest. *Adarand*, 228 F.3d at 1136 (citation omitted). Instead, there must be statistical evidence of a comparison of qualified, ready, willing, and able contractors to similar non-minority contractors (in this case, the "construction

subcontracting industry"). Numerical goals used in racial preferences must bear a meaningful relationship to the pool of qualified minorities. *Croson,* 488 U.S., at 501-502, 507.

Respondents also lacked (and still lack) such compelling statistical evidence. On June 30, 1998, the U.S. Department of Commerce ("DoC") published its so-called "benchmark study" (dealing with federal prime contracts) that purports to measure the "utilization" of SDBs against their predicted "capacity" (based on a mathematical model and regression analysis). *See* Small Disadvantaged Business Procurement; Reform of Affirmative Action in Federal Procurement, 63 Federal Register 35713 (June 30, 1998). The benchmarks were created in an attempt to satisfy the narrow tailoring prong of strict scrutiny (and not to demonstrate compelling interest) and to, *inter alia*, justify the use of a ten percent price evaluation adjustment (increasing non-SDB bids by ten percent relative to SDB bidders). *See* 63 Federal Register at 35716.[14] Where there is alleged "underutilization" of SDBs (*i.e.*, a disparity between utilization and capacity) the government claims the effects of discrimination are present and government procurement officials can use certain race-conscious mechanisms. *See* 61 Federal Register at 26045. Among other flaws, the benchmark study does not disclose the alleged

[14] As originally conceived, the benchmarks also were to measure the utilization and capacity of SDBs "but for" discrimination. *See* Appendix A, 61 Fed. Reg. at 26045. However, that never occurred (*see* 63 Fed. Reg. at 35718 n.10), and it would be "'sheer speculation' to simply guess how many firms there would be absent past discrimination." *See Adarand,* 228 F.3d at 1163, 1174, *citing Croson*, 488 U.S. at 498, 499. Of course, the benchmarks are post-enactment "evidence" and cannot satisfy strict scrutiny.

"underutilization" for any racial or ethnic group but rather only for SDBs as a whole. More importantly, any statistical evidence that the federal government *itself* is discriminating is rebutted by the long-held policies *against* discrimination in federal procurement and an absence of any evidence that there has been widespread violation of these policies.

There are other fundamental flaws associated with the benchmark study that raise significant questions about the government's motivation and the rights of third parties.[15] However, for purposes of the present action, the benchmarks are significant for two reasons. First, they demonstrate that the government believes construction and construction subcontracting operate regionally and not nationally. *See* 63 Fed. Reg. at 35716, 36718 (June 30, 1998) (listing and discussing benchmark limitations for construction by region); *see also* Appendix A, 61 Fed. Reg. at 26045 ("[w]here data indicate, however, that an industry operates regionally, the benchmark limitations will be established by region."). Thus, according to the government, construction and construction subcontracting

[15] Those flaws are too numerous to present here. As an example, however, the benchmark study did not measure subcontracts. *See* 63 *Fed. Reg.* at 35716-35717 (discussing contract obligations awarded by the federal government). It is one reason for the infirmity of the study. *See* Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. 25648, 25651 (May 9, 1997) ("subcontracts ...must be counted as well."). Nevertheless, the federal government somehow believes that "utilization" and "capacity" of SDB subcontractors will mirror SDB prime contractors and, therefore, where there is no "underutilization" of SDB prime contractors there should be no "underutilization" of SDB subcontractors. *See* Small Disadvantaged Business Procurement; Reform of Affirmative Action in Federal Procurement, 63 Fed. Reg. 71724 (December 29, 1998).

require regional findings of discrimination.

Second, according to the government, most of the areas for construction (including in particular for that corresponding to Colorado) do not show any alleged underutilization of SDBs. The federal government apparently has never published the purported "disparity" figures for the benchmarks in the Federal Register. However, they are included as Lodged Doc. 10. According to the government, SDBs are *overutilized* in the area that includes Colorado. *See* Lodged Doc. 10 (utilization and capacity, for the "mountain" region of construction, in SIC Code 15 are 27.2 and 22.1 percent, respectively; for SIC Code 16 are 27.0 and 13.3 percent, respectively; and for SIC Code 17 are 34.5 and 34.3 percent, respectively).[16]

According to the government's purported evidence, there is almost no aggregate disparity in the construction subcontracting industry with respect to states and localities. The Tenth Circuit concluded otherwise because it accepted the contents of Appendix A without conducting any independent investigation, as required by strict scrutiny, and thereby incorrectly stated that as a factual matter there is a 13% disparity between so-called minority enterprise "availability" and "utilization" in the overall construction subcontracting industry. *Adarand*, 228 F.3d at 1173-1174 (citing Appendix A and its reference to statistics in a report

[16] The overall calculations in the benchmark study show that the federal government is attempting to remedy disproportionality (however small). Indeed, some of the two-digit SIC Codes in the benchmark study show very little alleged disparity. *See* Lodged Doc. 10. Yet, the government uses race-conscious mechanisms even in those circumstances.

by the Urban Institute ("UI")). The appeals court relied on that purported "significant disparity as validation of the purported anecdotal evidence and of the Respondents' position." *Id.* Had the court conducted a proper analysis (or Respondents so disclosed), it would have known that a key piece of evidence cited in its opinion – the 87% figure in Adarand's subcontracting industry – was wrong.

Assuming somehow that the report was performed correctly, constituted a strong basis in evidence, and could be admitted for the truth of the matter asserted, UI only found a non-statistically significant disparity of 5% in the construction subcontracting industry regarding state and local awards. Enchautegui, María E., *et al.*, *Do Minority Owned Businesses Get A Fair Share of Government Contracts?* (the 1996 and 1997 versions are available at http://www.urban.org/authors/enchautegui.html) (collectively, the "*UI Report*"). The 87% figure, which was cited in Appendix A, came from a document that DoJ knew was a draft of the report. *See* Fed. Reg. at 26061 n.128 (discussing UI work performed "to date'). The number for construction subcontracting actually was 95%. *UI Report*, at Table II.1 and p. 19 (1996 report); Table 2.1 and p. 15 (1997 report). DoJ received a copy of the final report but did not mention the correct figure. *See* Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. at 25653.

In any event, as stated in its report, UI does not know the reason for any of the alleged disparities (whether in construction subcontracting, construction in general, or for any other of the examined areas) and notes that any number of factors could cause the alleged disparities. *UI Report* at ix (1996 version), at xiv (1997 version). Hence,

the report hardly constitutes "a strong basis in evidence" to use race in Adarand's industry.

Instead, the government's evidence raises troubling and lingering questions about the government's use of race, highlighting the need for exact and thorough judicial scrutiny which only can find that the DBE Program and the statutory and regulatory framework are unconstitutional.

CONCLUSION

The Court should reverse the judgment in favor of Respondents and enter judgment in favor of Petitioner.

Respectfully submitted,

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